IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 83, ORIGINAL

STATE OF MARYLAND, ET AL,
Plaintiffs,

V.

STATE OF LOUISIANA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

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V.

STATE OF LOUISIANA,
Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

JURISDICTION

This action is pending on a Motion for Leave to File a Complaint and does not present the issue of constitutionality of the Louisiana statutes in question. This is not a controversy between the Plaintiff States and Louisiana which falls within the original and exclusive jurisdiction of this Court. The Plaintiff States have no interest legal and recognizable in this dispute either in their

proprietary capacities or on behalf of their citizens and, hence, the provisions of Article III, Section 2 of the Constitution of the United States are not applicable.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

The sole question presented in this Motion is whether or not the Plaintiff States have proper standing to institute this action and particularly whether or not they are the real parties at interest in this controversy. Specifically, the question of the constitutionality, the wisdom, the merits, or the reasonableness of the Louisiana First Use Tax is not at issue on this Motion. The sole and only question relates to the procedural standing of the Plaintiff States to institute this action, and, hence, to invoke the original jurisdiction of this Honorable Court.

1. Should this Court exercise its original jurisdiction over a challenge by some states to the tax laws of another state if there is now pending an action in state court which will effectively dispose of all constitutional claims Plaintiff States are attempting to bring before this court?
2. Does the original jurisdiction of the Supreme Court extend to a challenge by several states to the tax laws of another state on the grounds that those laws infringe upon the federal constitutional rights of individual citizens?

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the Constitution of the United States provides:

"The judicial Power shall extend ... to Controversies between two or more States; ...
In all Cases ... in which a State shall be Party, the Supreme Court shall have original Jurisdiction. ..."

COUNTER-STATEMENT OF THE CASE

Plaintiff States seek to set aside and enjoin, on alleged constitutional grounds, Louisiana's First Use Tax on Natural Gas (hereinafter referred to as "First Use Tax"),[1] by alleging a purported controversy between themselves and the State of Louisiana under two theories. The first is proprietary in nature. Plaintiff States are themselves consumers of gas and will, they say, sustain an increased economic burden because Louisiana's First Use Tax will be passed on to them.[2]

Plaintiff States second theory is as *parens patriae* for their citizens, to protect their alleged right to be free of any burden on interstate commerce.

In neither of these respects have Plaintiff States asserted adequate justiciable interest to warrant the application of the extraordinary original and exclusive jurisdiction of this Honorable Court.

Although raised by Plaintiffs, none of the factual averments in the "Statement" of Plaintiffs' Brief (pages 4, 5 and 6) are germane to the real issue before this Court.

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1. First Use Tax on Natural Gas, Act. No. 294 of 1978, Regular Session (La. R.S. 47:1301-1307).
2. If it is passed on in the future, it will not be because Louisiana's First Use Tax requires it. The legal incidence of the tax is upon the first user of the gas *within Louisiana*; although an economic burden might ultimately be on Plaintiffs. See *First Agricultural Bank v. State Tax Commission*, 392 U.S. 339 (1967), *Gurley v. Rhonde*, 421 U.S. 200 (1975). Plaintiffs' status in this respect, is no different from all consumers of goods or services who have at best a remote interest in the litigation of the validity of the tax.

SUMMARY OF ARGUMENT

I.

STANDING

The Plaintiff States do not have nor do they acquire standing by virtue of their alleged proprietary interests or as *parens patriae* of their citizens to challenge the Louisiana First Use Tax.

An objection by several States to the imposition of a tax in another State is not such a controversy as will appropriately place the issue of the initial determination of the validity of said tax within the original jurisdiction of this Court.

This action is squarely precluded by the decision in *Arizona v. New Mexico*, 425 U.S. 794 (1976).

II.

THE LOUISIANA FIRST USE TAX DOES NOT RAISE IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

The Louisiana Legislature enacted Act No. 294 of 1978, which established the First Use Tax on Natural Gas, however, the tax was not to commence accruing until April 1, 1979 at 7:00 o'clock A.M.

Section 1303(A) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, provides in pertinent part:

> ". . . there is hereby levied and imposed a tax upon the first occurrence within this State of any use, as defined in this Part, of any natural gas upon which no severance tax or tax upon the volume of production has been paid, or is legally due to be paid, to this State or any other State or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. . . ."

Section 1302(8) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, defines "use" for the purpose of the tax as:

> "... the sale; the transportation in the State to the point of delivery at the inlet of any processing plant; the transportation in the State of unprocessed natural gas to the point of delivery at the inlet of any measurement or storage facility; transfer of possession or relinquishment of control at a delivery point in the State; processing for the extraction of liquefiable component products or waste materials; use in manufacturing; treatment; or other ascertainable action at a point with the state."

Section 1303(E) and (F) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act 294 of 1978, provides:

> "E. Nothing in this part shall be construed as imposing any tax on the production, severance, or ownership of natural gas produced outside of the boundaries of the State of Louisiana, it being the intention of this Part that the incidence of this tax shall not be upon the natural gas nor upon the property or rights from which it is produced, but rather shall be only upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the State.
>
> F. If any use as defined in this Part and first occurring is determined not to be a constitutionally taxable incident, the tax shall be imposed upon the use first occurring thereafter."

Plaintiff States allege the unconstitutionality of The First Use Tax upon the legal premises that:

1) it is a discriminatory burden upon interstate commerce for (a) it is a tax on interstate commerce; (b) there is insufficient nexus to support a taxable incidence in the State; (c) it is not fairly apportioned; (d) it discriminates against interstate commerce; and (e) it is not fairly related to the services provided by the State;

2) it violates the Supremacy Clause of the United States Constitution because it conflicts with the Natural Gas Act, The Natural Gas Policy Act of 1978 and the Outer Continental Shelf Lands Act;

3) it is an impost or duty on imports;

4) it impairs the obligations of contracts; and,

5) it denies equal protection of the laws.

Interstate Commerce may be compelled to pay its way where in the past it has been able to avoid payment for the services rendered by the State of Louisiana and the adverse impact made upon the State of Louisiana. The First Use Tax meets all constitutional standards established by this Court which allows States to justifiably burden interstate commerce. The tax is *not* an undue burden on interstate commerce as alleged by Plaintiff States.

ARGUMENT

I.

PLAINTIFF STATES DO NOT HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX

A. PLAINTIFF STATES DO NOT HAVE STANDING IN THEIR PROPRIETARY CAPACITIES TO CHALLENGE THE LOUISIANA FIRST USE TAX.

It has long been established that in order for a plaintiff state to invoke the original jurisdiction of this Court, it must demonstrate that the injury for which it seeks redress was directly caused by the actions of another state. *Massachusetts v. Missouri*, 308 U.S. 1, (1939); *Pennsylvania v. New Jersey*, 426 U.S. 660, (1976).

Plaintiff States claim that they as consumers, and their political subdivisions and educational institutions, as consumers of natural gas will suffer financial distress as a result of the Louisiana First Use Tax.

In *Arkansas v. Texas*, 346 U.S. 368 (1953), this Court succinctly stated the rule to be used in determining if a state was truly a real party at interest. The rule is as follows:

> "In determining whether the interest being litigated is an appropriate one for the exercise of our original jurisdiction, we of course, look behind and beyond the legal form in which the claim of the state is pressed. We determine whether in substance the claim is that of the state, whether the state is indeed the real party in interest." 346 U.S. 371.

Defendant State is not attempting in any manner to impose a tax on other states or other instrumentalities. The First Use Tax is imposed on the first use of natural gas within the State of Louisiana and the incident of the tax will, in fact, fall upon the owners of the gas at the time a taxable use occurs within the state. Louisiana Revised Statutes, Title 47, Section 1301 through 1307, 1351.

Plaintiff States real complaint is that the Federal Energy Regulatory Commission (FERC) has, through a series of orders, provided procedures which permit affected pipeline companies to pass along the amount of the Louisiana First Use Tax to their customers, subject to refund with interest should the tax ultimately be found invalid.[3]

As a practical matter in any regulated or unregulated industry, all taxes — local, state or federal — are ultimately passed along to the consumer be they individuals, political subdivisions or states of the United States. Defendant Louisiana has caused no direct injury to Plaintiff States such as would render them real parties at interest and thus invoke the original jurisdiction of this Court. Plaintiff States do not have standing in their proprietary capacity to challenge the Louisiana First Use Tax.

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3. State of Louisiana First Use Tax in Pipeline Rate Cases, Docket No. RM 78-23, Order No. 10, "Order Establishing Procedures Governing Pipeline Recovery of the State of Louisiana First Use Tax," issued August 28, 1978, 43 Fed. Reg. 45, 553 (October 3, 1978); Order No. 10-A, "Order on Rehearing, Modifying Prior Order, Amending Regulation and Requesting Comment," issued December 20, 1978, 43 Fed. Reg. 60 438 (December 28, 1978), Appeal Docketed, Tennessee Gas Pipeline Company v. Fed. Energy Regulatory Commission, No. 78-38-13, et al (5th Cir., December 26, 1978); and Order No. 10-B, "Order on Rehearing, Modifying Prior Order and Amending Regulations," issued March 2, 1979, 44 Fed. Reg. 13, 460 (March 12, 1979.)

B. PLAINTIFF STATES DO NOT HAVE STANDING TO CHALLENGE THE LOUISIANA FIRST USE TAX AS *PARENS PATRIAE* OF THEIR CITIZENS WHO ARE CONSUMERS OF NATURAL GAS.

Plaintiff States urge that they have standing to invoke the original jurisdiction of this Court as *Parens Patriae* of their citizens, as consumers of natural gas, which may be subject to the Louisiana First Use Tax. They bring to the attention of this Court in support of their claim the case of *Pennsylvania v. West Virginia*, 262 U.S. 553, (1923). There is an important distinction between the case of *Pennsylvania v. West Virginia* and the instant case. West Virginia was attempting to cut off or curtail natural gas flowing into Pennsylvania. Louisiana is not attempting in any way to deprive any of the Plaintiff States or their citizens of natural gas.

A state has standing to sue only when its sovereign or quasi sovereign interests are implicated and not to litigate the personal claims of its citizens.[4] For the previously discussed reasons, Plaintiff States' citizen consumers who may be called upon as a result of FERC regulations to bear the cost of the tax are in no different position than any consumer of any product or service who must bear added cost resulting from local, state and federal taxes, be they sales taxes, use taxes or gross receipts taxes.

Plaintiff States do not have standing to invoke the original jurisdiction of this Court to challenge

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4. *Pennsylvania v. New Jersey*, supra.

the Louisiana First Use Tax as *Parens Patriae* of their citizens who are consumers of natural gas. Were this permitted, this Court would be inundated with original jurisdiction suits every time FERC or some other regulatory agency allowed rate adjustments.

C. THIS SUIT IS BARRED BY THE DECISION IN *ARIZONA V. NEW MEXICO*.

In *Arizona v. New Mexico*, 425 U.S. 794 (1976), this Court declined to exercise its original jurisdiction in a suit strikingly similar to the case now before the Court. Comparison of *Arizona* and this case will leave no doubt that this Court should again decline to take action.

Arizona, in its Bill of Complaint, asked for declaratory relief invalidating a New Mexico electrical energy tax as being unconstitutionally discriminatory against and a burden on interstate commerce, that it denied Arizona citizens due process and equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States and that it abridged the privileges and immunities guaranteed by Article IV, Section 2 of the Constitution of the United States. It asked that the Court enjoin New Mexico from assessing, levying or collecting the tax. The issues presented and relief desired were not unlike the present case.

The State of Arizona, as a consumer, and its citizens, as consumers, purchased substantial amounts of electrical energy generated in New Mexico and the subject of the electrical energy tax.

Arizona sought to invoke the original jurisdiction of this Court in its proprietary capacity and as *Parens Patriae* for its citizens urging that the tax was a burden economically on it and its citizens. In the instant case, we have Plaintiff States asserting that Louisiana's First Use Tax will fall on them and their citizens causing economic hardship and, as in the Arizona case, filing a complaint in this Court in their proprietary capacity and as *Parens Patriae* for its citizens. Three Arizona utilities filed suit in New Mexico State Court raising the Constitutional issues previously discussed.

Although the initial returns as to Louisiana's First Use Tax are not due until May 31, 1979, the State officers, constitutionally charged with responsibilities as to the administration, collection and enforcement of the First Use Tax, instituted an action in the Nineteenth Judicial District Court for the Parish of East Baton Rouge, a State Court of general jurisdiction. *Edwards et al v. Transcontinental Gas Pipe Line Corp., et al,* No. 216,867, 19th Judicial District Court, Division "F", Parish of East Baton Rouge, State of Louisiana. Named as Defendants in this litigation are all of the persons who would be liable for the payment of the tax under the statutory provisions thereof.

Additionally, the Federal Energy Regulatory Commission has instituted an action in the Federal District Court for the Middle District of Louisiana, *Federal Energy Regulatory Commission v. Shirley McNamara, et al,* Civil Action No. 78-384, U.S. District Court, Middle District of Louisiana. Named as Defendants therein are Shirley McNamara, William J. Guste, Jr., and Raymond T. Sutton.

A Motion to Stay was granted and is on appeal.[5] Argument has been set for Monday, June 25, 1979.

The issues as posed by the Petition and the answers filed in the State Court and the Federal Court Complaint, allege all the constitutional infirmities raised here by the Plaintiffs. Thus the very same issues which Plaintiffs seek to have this Court consider are before lower courts, both State and Federal. If on appeal the Louisiana Supreme Court should hold the tax unconstitutional, Plaintiffs will have been vindicated. If the Louisiana Supreme Court holds the tax constitutional, the issues will come to this court by way of direct appeals under 28 U.S.C. Sec. 1257 (2). If the Federal proceeding continues, likewise, the matter is ultimately recognized by this Court. There is thus no sound reason for this Court to hear Plaintiffs' complaint, and this is especially true in view of the long-standing congressional and judicial policy not to interfere in State tax matters. 28 U.S.C. Sec. 1341. *Great Lakes Dredge & Dock Company v. Huffman*, 319 U.S. 293 (1943); *Toomer v. Witsell*, 334 U.S. 385 (1949); *Matthews v. Rodgers*, 284 U.S. 521 (1932).

In the *Arizona* case, this Court was persuaded that the pending State Court action provided a forum in which to litigate the same issues as were set forth in the complaint of Arizona filed in this Court and seeking to invoke the original jurisdiction of the Court. In the instant case, a pending

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5. *Federal Energy Regulatory Commission v. Shirley McNamara, et al*, in the United States Court of Appeals for the Fifth Circuit, Docket No. 79-1403.

State Court proceeding with the same issues before it can resolve the issues set forth in Plaintiff States' complaint.

The Court in *Arizona* made the following comment:

> "In denying the State of Arizona leave to file, we are not unmindful that the legal incident of the electrical energy tax is upon the utilities. 96 S. Ct. 1845, 1847."

The legal incident of the Louisiana First Use Tax is not on Plaintiff States or their citizens. It is only owners of the gas at the time a use occurs in Louisiana who are liable for the tax.

Plaintiff States argue in brief that *Arizona v. New Mexico*, supra, should not govern in this case for various reasons. They quote from the concurring opinion that Arizona was "not sufficiently affected" by the tax and had not alleged "some impact on the rates paid by consumers of electricity in Arizona." 425 U.S. at page 798. Defendant State believes pertinent language from the Per Curiam opinion indicates that indeed Arizona was affected by the taxes and the Court's language as follows shows this:

> "The State of Arizona, as a consumer, and its citizens, as consumers, purchase substantial amounts of electrical energy generated in New Mexico by three Arizona utilities operating generating facilities there. Two of the utilities are investor-owned public service corporations; the third, Salt River Project, Agricultural Improvement and Power District, operates a federal reclamation project and is a political subdivision of Arizona." 425 U.S. at page 794.

The above language indicates that two Arizona utilities, as well as a third utility which was a political subdivision of Arizona, would all be liable for the tax. Obviously, if the utilities were going to have to pay a tax on the generation of electricity, they were going to pass on this tax to the consumers, the State of Arizona and its citizens, in the form of a rate increase at some point in time. Plaintiff States distinguish the present case from the *Arizona v. New Mexico* case in that the utility companies refused to pay the New Mexico tax and thus it was not passed on pending challenges to the tax. A campanion statute to the First Use Tax in Louisiana provides for a First Use Tax trust fund and that "if by final action of a court of last resort, a tax held in escrow in the State Treasury is held to be invalid as to any taxpayer who paid the tax, the taxes paid, with interest accrued thereon, shall be paid to the taxpayer." *Act 293 of 1978, Louisiana Revised Statutes 47:1351.* FERC has allowed the pipelines to pay the First Use Tax to Louisiana and to pass the tax on to their customers even though two suits are pending to determine the validity of the tax at this time.

Plaintiff States assert in their brief that the two suits now pending are not suitable vehicles by which they may assert their claim and that their complaint raises issues of national significance and federal law not raised by Arizona's challenge to the New Mexico electrical energy tax and asserts that this is not a simple dispute between two neighboring states as was the case in *Arizona v. New Mexico.*

Defendant State contends that the number of states challenging the First Use Tax and the number of persons claiming to be aggrieved are not sufficient cause to invoke the original jurisdiction of this Court.

There are a number of factors present in the instant case which warrant this Court's denying Plaintiff States' motion to file a complaint and invoke the original jurisdiction of this Court. This Court has long acknowledged and held that state courts of general jurisdiction have the power to decide cases involving federal constitutional rights. *Boston Stock Exchange, et al v. State Tax Commission, et al*,_____U.S._____, (1977). There is at this time, as previously mentioned, a suit pending in the State Court of Louisiana seeking declaratory relief as to the validity and constitutionality of the Louisiana First Use Tax.

An even more compelling reason for this Court refusing to invoke its original jurisdiction, even if it is satisfied that it has jurisdiction, is that it is not a foregone conclusion that the Louisiana First Use Tax statutes do not run afoul of the Louisiana Constitution of 1974 and this has been asserted in the suit filed in Louisiana State Court. The Louisiana Constitution of 1974 is new and to a large measure uninterpreted. The State Court is an appropriate forum for resolution of state constitutional issues and the resolution of these issues may moot any federal constitutional questions which may be asserted.

In *Ohio v. Wyandotte Chemical Corporation*, 401 U.S. 493, (1972), in denying leave to file a complaint invoking the original jurisdiction, the Court stated:

> "This Court is, moreover, structured to perform as an appellate tribunal, ill equipped for the task of fact finding and so forced, in original

> cases, awkwardly to play the role of fact finder without actually presiding over the introduction of evidence. Nor is the problem merely our lack of qualifications for many of these tasks potentially within the purview of our original jurisdiction; it is compounded by the fact that for every case in which we might be called upon to determine the facts and apply unfamiliar legal norms we would unavoidably be reducing the attention we could give to those matters of federal law and national import as to which we are the primary overseers." 401 U.S. at 498.

While Plaintiff States by way of footnote in their brief contend that "this action is not likely to raise many, if any, disputed factual issues, . . .," at page 18, Defendant State urges that there will be extensive factual considerations of great complexity. There will have to be voluminous findings of facts of a scientific and technical nature in determining what "use" and in what way this "use" takes place in order to determine if there is a taxable incident. Again, complex factual determinations will have to be made in determining the damage and cost to Louisiana and her coastal areas, to the care and preservation of which portions of this tax are dedicated.

As suggested earlier in this brief, this is basically a dispute between Louisiana and the corporations upon whom the First Use Tax will fall and not between Plaintiff States and Louisiana.

This is not a classic case in which the original jurisdiction of this Court has been necessary to resolve an issue such as a dispute between states as to the determination of boundaries and water rights. *Wright's Federal Court*, 3d Edition, page 558; *Nebraska v. Iowa*, 406 U.S. 117, (1972); *Kansas v. Colorado*, 105 U.S. 125 (1902).

In the scheme of the Constitution, the State Courts are the primary guarantors of constitu-

tional rights. To this end, the Louisiana Supreme Court, the only Court that can interpret the statute (First Use Tax) with finality, should be permitted to do so. The Louisiana Declaratory Judgment statute (La. Code of Civil Procedure, Arts. 1871-1883) is available to secure such an interpretation. The state court is the sole and only forum where all of the parties may be heard.

Obviously, both the Plaintiffs and the Defendants in the State Court action may be heard there. The Plaintiffs, the Defendants and the Intervenors in the federal court proceedings may also be heard in the State Court proceeding. *Leiter Minerals, Inc. v. United States*, 352 U.S. 220 (1957); additionally, Plaintiff States and Defendant in these proceedings may be heard in the State Court proceedings. *State of Nevada, et al v. Hall*,_____U.S. (March 15, 1979).

The Louisiana Declaratory Judgment Statute is available to public officials, *Hainkel v. Henry*, 313 So.2d 577 (La. Sup. Ct. 1975); *Edwards v. Parker*, 332 So.2d 125 (La. Sup. Ct. 1976), and its application will effectively and expeditiously resolve the constitutional issues surrounding the validity of the First Use Tax. *In Re Oxygen Welder's Sup. Prof. Shar. P&T.A.*, 297 So.2d 663 (La. Sup. Ct. 1974).

Arizona v. New Mexico is clearly applicable in the instant case and should govern, and bar Plaintiff States invoking the original jurisdiction of this Court. Constitutional questions are involved, suits are presently pending on these same issues and Plaintiff States are similar as to capacity to file suit. This Court should deny the motion of Plaintiff States "leave to file a bill of complaint" as this Court did in *Arizona v. New Mexico*, supra.

In submitting that this Court should deny Plaintiffs' Motion, we note the proposition that the Court will exercise its original jurisdiction only

where it is clearly shown that resort to this extraordinary form of action is required. In *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972) the Court noted:

> "It has long been this Court's philosophy that 'our original jurisdiction should be invoked sparingly.' . . . We construe 28 USC Sec. 1251 (a) (1), as we do Art. III, Sec. 2, cl 2. to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

See also *Washington v. General Motors Corp.*, 406 U.S. 109 (1972) and *Arizona v. New Mexico*, 425 U.S. 794 (1976).

The Court also has recently reaffirmed its view that disputes over the states' imposition of taxes ordinarily should not be entertained in an original action. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 497 (1971), Justice Harlan, speaking for the Court, said:

> "As our social system has grown more complex, the States have increasingly become enmeshed in a multitude of disputes with persons living outside their borders. Consider, for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, governmental contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a potential principal forum for settling such controversies."

II.

THE LOUISIANA FIRST USE TAX DOES NOT RAISE IMPORTANT AND SUBSTANTIAL FEDERAL QUESTIONS AND IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT

RESPONSE TO PLAINTIFFS STATES' ARGUMENTS ON THE VALIDITY OF THE TAX

As previously stated, Louisiana believes that the following discussion is not germane to the real issue presented herein because the merits, or the wisdom, or even the constitutionality of the First Use Tax is not presently before this Court. The sole and only issue to be decided is one of jurisdiction - one of proper standing by states to invoke the extraordinary exclusive, original jurisdiction of this Court. However, since Plaintiff States have seen fit repeatedly to argue all of the substantive issues involved in the constitutional question surrounding the First Use Tax, Louisiana deems it appropriate, indeed, necessary to make this brief response.

The alleged substantial questions raised by Plaintiff States have all been disposed of by this Honorable Court and the standards to be utilized are now well established. The fact that the amount of taxes that may be collected is large is of no moment. The Louisiana First Use Tax does not offend federal statutes.

A. THE LOUISIANA FIRST USE TAX DOES NOT CONSTITUTE AN UNCONSTITUTIONAL AND DISCRIMINATORY BURDEN UPON INTERSTATE COMMERCE

In *Department of Revenue of the State of Washington v. Association of Washington Stevedoring Companies*, 435 U.S. 734, 750 (1978), this Court

held that ". . . As was recognized in *Western Livestock v. Bureau*, supra, interstate commerce must bear its fair share of the state tax burden." Furthermore, taxes have been sustained "that are applied to activity with substantial nexus with the State, that are fairly apportioned, that do not discriminate against interstate commerce, and that are fairly related to the services provided by the State." Id.[6]

The Louisiana First Use Tax, a tax upon the first use of natural gas within the State and not a mere tax on interstate commerce, meets each standard announced by this Court.

1. THE LOUISIANA FIRST USE TAX IS NOT A TAX ON INTERSTATE COMMERCE

The tax in question is imposed upon the first *use* "of any natural gas upon which no severance tax or tax upon the volume of production has been paid or is legally due to be paid, to this state or any other state or territory of the United States, or which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country."[7]

The First Use Tax is not a "gathering tax" as was declared unconstitutional in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954). There, Texas levied a tax on the production of natural gas measured by the entire volume of gas to be shipped in interstate commerce. A refinery extracted the gas from crude oil and transported it 300 yards to the pipeline. The State identified, as a local incident, the transfer of gas from the refinery to the pipeline.

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6. Accord, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 279 (1977).
7. La. R.S. 47:1303(A)

The First Use Tax is not on the production of gas but rather is "upon the privilege of performance or allowing the performance, by the owner, of the enumerated actions comprising first use within the State."[8] The incident of taxation is upon the first use of the natural gas in Louisiana. The exact first occurrence of a defined use is a factual determination that can only be made with a complete disclosure of all relevant facts.

In *Michigan-Wisconsin*, supra, the incident of local taxation was *after* production, sale and processing and merely upon the actual entrance into interstate commerce. The defined uses are set forth in Section 1302(8) of Title 47 of the Louisiana Revised Statutes of 1950, as amended by Act No. 294 of 1978, and all such uses are separate and distinct local activities only occurring within the boundaries of the State of Louisiana. These identifiable uses do not occur in other States and, in fact, occur prior to the gas being commercially acceptable for marketing and sale in interstate commerce.

2. THE LOUISIANA FIRST USE TAX IS APPLIED ON ACTIVITIES HAVING A SUFFICIENT NEXUS WITH LOUISIANA

The gas in question and the defined uses have more than adequate nexus with the State of Louisiana. The issue of nexus is a problem of factual proof. Many processing plants are utilized within the State; several large underground storage facilities are likewise utilized within the State; and, numerous other activities occur within the State prior to the gas attaining the status of being in interstate commerce. The numerous activities occurring to the gas prior to its being in a commercially accepted stage all occur within the State.

8. La. R.S. 47:1303(E).

3. THE LOUISIANA FIRST USE TAX IS FAIRLY APPORTIONED

> "... duly apportioned, that is, does not undertake to tax interstate activities carried on outside of the State's borders; ..."[9]

The Louisiana First Use Tax does not tax any activity not occurring within the State of Louisiana. The tax is not on the gross receipts which are realized outside of the State but rather is on that use of the natural gas which, prior to said use, has been free of any tax.

Multiple taxation cannot occur; the uses upon which the tax is levied do not occur outside of the State of Louisiana. The Plaintiff States may legally tax the gas when it reaches the boundaries of each State once the gas has passed into the local distribution system for delivery to customers.[10] Whereas, the "uses" subject to the First Use Tax occur prior to the gas reaching the steady flow of interstate commerce contrary to the situation in *Michigan-Wisconsin*, supra.

4. THE LOUISIANA FIRST USE TAX DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE

The First Use Tax is not discriminatory in that it does not provide a direct commercial advantage to local business, does not subject interstate commerce to the burden of "multiple taxation,"[11] and does not "discriminatorily tax the products manufactured or the business operations performed in any other State." *Boston Stock Exchange v. State Tax Commission*, _____U.S._____(1977).

The entirety of the First Use Tax is upon the actual use within the State of Louisiana of a product that has not been heretofore subject to any

9. *Mississippi Gas Co. v. Stone*, 355 U.S. 80, 96-67 (1948).
10. *East Ohio Gas Co. v. Tax Commission of Ohio*, 283, U.S. 465 (1931).
11. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

taxation. The tax is imposed upon uses of natural gas after having entered the State of Louisiana all within the ambit of the First Use Tax. The tax incidence occurs in Louisiana prior to the flow of the natural gas in interstate commerce.

An equivalent tax is imposed upon natural gas produced within the State of Louisiana. The First Use Tax removes the discrimination or disadvantage imposed upon gas produced within the State and places the natural gas subject to the First Use Tax on an equal basis with that gas produced within the State, which was not the case heretofore.

The "practical effect" of the First Use Tax is to remove the discrimination against gas produced within the State and have interstate commerce pay its way for the services provided by the State upon taxable incidences occurring solely within the State of Louisiana.

The First Use Tax in conjunction with the Severance Tax Credit[12] does not discriminate against interstate commerce in that all gas used in Louisiana, whether ultimately consumed outside of the State, now has the same tax liability. Tax credits are valid enactments of State Legislatures and only if they place an undue burden on interstate commerce are they subject to attack. Producers of natural gas subject to the Louisiana Severance Tax are granted a credit up to the amount of said severance tax, however, they are liable for the tax and should their severance tax liability be reduced, by non-production or lower severance taxes, then the First Use Tax becomes due and owing.

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12. La. R.S. 47:647, as enacted by Act No. 293 of 1978.

5. THE LOUISIANA FIRST USE TAX IS FAIRLY RELATED TO SERVICES PROVIDED BY LOUISIANA

Since offshore development started in Louisiana in the 1950's, all State services have been provided for the product and owners (agents, employees, corporations, etc.) thereof at the sole expense of the State without adequate compensation for the State services and the damage to the State.

A 1974 study conservatively concluded that State and Local Government in Louisiana was incurring a net loss of 40 million dollars a year as a result of the governmental services required and provided for outer continental shelf development.[13] This same study revealed that in 1970, there were 1,303 producing wells located offshore Louisiana in the federal domain of the Outer Continental Shelf compared to 322 producing gas wells within the offshore jurisdiction of Louisiana. All of the gas marketed from these Outer Continental Shelf wells is transported to shore in Louisiana, and, ultimately, approximately 98-½% is transported out of State through a network of pipelines which necessitated the digging and use of hundreds of canals and pipeline trenches in the fragile coastal marshes and across the barrier islands of the State.

Through shoreline and barrier island erosion it is estimated that Louisiana is losing a tangible unit of sixteen square miles of land annually,[14] with an optimum economic replacement value of 800 million dollars.[15] Roughly 40% of this land loss has been attributed to these canals, trenches and spoil banks which serve the marketers of Outer Continental Shelf gas.[16]

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13. Offshore Revenue Sharing: An analysis of offshore operations on coastal states: By Gulf South Research Institute, Project XS-614, 1974.
14. Cumulative Impact Studies in the Louisiana Coastal Zone: Eutrophication, Land Loss: (N.J. Craig; J.W. Day, Jr., 1977).
15. The Value of the Tidal Marsh (Gosselink, Odum and Pope, 1974).
16. Cumulative Impact Studies in the Louisiana Coastal Zone: Eutrophication, Land Loss (supra).

As can be seen a large factual basis must be established, and can well be done, to value the services provided by the State as respects the value of the tax. It is time for the industry to bear its fair share of all state services rendered in behalf of the industry.

B. THE LOUISIANA FIRST USE TAX DOES NOT VIOLATE THE SUPREMACY CLAUSE

No federal preemption can be shown which prohibits a State from imposing a lawful tax upon natural gas activities within the boundaries of the imposing State.

The Natural Gas Policy Act of 1978 specifically recognizes States' rights to tax natural gas; any change from the tax structure in effect on December 31, 1978, must be uniformily applied to all natural gas. The First Use Tax was enacted in July, 1978.

The Outer Continental Shelf Lands Act prohibits State Taxation within the territorial limits of the Outer Continental Shelf, however, all taxable incidents of the First Use Tax are within the boundaries of the State of Louisiana, and are not prohibited by said Act. Natural gas after leaving the federal domain is no longer immune from State Taxation.

C. THE LOUISIANA FIRST USE TAX IS NOT AN IMPOST OR DUTY ON IMPORTS.

> ". . . there is hereby levied and imposed a tax upon the first occurrence within this state of any use, . . ., of any natural gas . . . which is not subject to the levy of any import tax or tariff by the United States as an import from a foreign country. . . ." La. R.S. 47:1303A

Clearly under Article 1, Section 10, Clause 2 of the United States Constitution *only* the federal

government may levy an impost or duty on imports. This taxing authority over imports subjects all natural gas imported from a foreign country to a levy of a federal impost or duty. Being subject to such a levy exempts all natural gas imported from a foreign country from the imposition of the Louisiana First Use Tax because of its character as an import, whether or not such levy is actually imposed.

The First Use Tax does not offend any of the standards or policy considerations set forth in *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976). The tax does not and cannot reach natural gas imported from a foreign country. Thus, foreign policy of the nation is not affected, no federal import revenues are affected and the harmony between the states is not upset when commerce pays for the governmental services it enjoys.

D. THE LOUISIANA FIRST USE TAX DOES NOT UNCONSTITUTIONALLY IMPAIR THE OBLIGATION OF CONTRACTS

Contracts may be modified or altered by State Law "upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977); *Allied Structural Steel v. Spannaus*,_____U.S._____, 57 L.Ed 2d 727 (1978); and *City of El Paso v. Simmons*, 379 U.S. 497 (1965).

The exercise of the police power of the State is not an unlimited power to modify private contracts but rather a reasonable and appropriate exercise of a State's police power which modifies or alters contracts does not violate the Contract Clause, Article I, Section 10, Clause 1 of the United States Constitution.

The First Use Tax, as respects the policy of declaring certain provisions of contracts unenforceable, meets the test set forth in *Spannaus*, supra. The owner as taxpayer should bear the tax burden of allowing its product to be used within the State. The Federal Energy Regulatory Commission has already established a fully-passed-on cost, by Rule (see footnote 2, supra), of the First Use Tax. By allowing the pass-on there is no contract clause problem.

E. THE FIRST USE TAX DOES NOT DENY EQUAL PROTECTION OF THE LAWS.

The First Use Tax applies to all owners of natural gas, as defined by law, wherein an identifiable first use is within the boundaries of this State. Tax credits and exemptions are valid exercises of the tax powers of a State. Different classification of taxpayers are permissible as well as separate classifications for the levy of a tax.

To withstand an equal protection argument the distinction made must be "rationally related to furthering a legitimate State interest." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976).

The First Use Tax is not applied unequally, it is applied to all natural gas subject to the tax regardless of any other factors. Certain credits may reduce the individual tax liability of some taxpayers, however this is insufficient to say there is a denial of equal protection of the laws.

CONCLUSION

Plaintiff States have not stated a controversy "between two or more states", nor have they established sufficient standing in any respect as to warrant the exercise of the exclusive, original jurisdiction of this Court. The validity of a state tax should not be initially litigated with this Court as the principal forum. Furthermore, the tax in question does not offend federal statutes and is a justifiable exercise of the police powers of the State of Louisiana.

If the court should accept jurisdiction, which is not urged, over plaintiffs' Complaint, Louisiana would move the Court to consider staying any further proceedings in this case until appeal of the State case to this Court has been perfected, or until the Federal action is in the posture for consideration by this Court for review. Such action would be particularly appropriate in order to avoid triplicate effort in three forums.

Plaintiff States' Motion should be denied.

Respectfully submitted:

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Certificate of Service

I HEREBY CERTIFY that I have this day mailed, postage prepaid, the foregoing to all opposing counsel.

Baton Rouge, Louisiana, this_____day of May, 1979.

_____
CARMACK M. BLACKMON